A

GAN BOON AUN v. PP

COURT OF APPEAL, PUTRAJAYA
HADHARIAH SYED ISMAIL JCA
M GUNALAN JCA
AZMAN ABDULLAH JCA
B [CRIMINAL APPEAL NO: W-09(H)-26-02-2022]
15 NOVEMBER 2023

Abstract – *(i) The words used in s. 314(1) of the Criminal Procedure*
C *Code are clear and unambiguous, in that, a notice of appeal is to be served personally on the accused. A notice of appeal cannot be said to have been personally served on the accused on the basis that his solicitors attended case managements as this is not how service is to be effected;*
(ii) Even though the court can proceed with an appeal in the absence of
D *the accused under s. 314(2) of the Criminal Procedure Code, it must be read with s. 314(1), ie, the court is still subject to the limitation that the court shall not make any order in the matter of the appeal adverse to or to the prejudice of the accused, such as enhancement of imprisonment sentence, which can be a clear violation of s. 314(1).*

E

CRIMINAL PROCEDURE: *Sentence – Enhancement – Appeal against – Enhancement of one day imprisonment to 24 months' imprisonment – Enhancement of imprisonment ordered in absence of accused – Whether there was contravention of s. 314(1) of Criminal Procedure Code – Whether order of court null, void and illegal – Whether ought to be set aside*

F

CRIMINAL PROCEDURE: *Offence – Giving misleading statement – Accused found guilty under s. 122B(a)(bb) read together with s. 122(1) of Securities Industry Act 1983 – Appeal against sentence by prosecution – Whether notice of appeal served personally on accused – Whether there was contravention of s. 314(1) of Criminal Procedure Code*

G

The appellant was charged with an offence of giving a misleading statement to Bursa Malaysia Securities Berhad in a company's 'Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006', an offence under s. 122B(a)(bb) read together with s. 122(1) of the
H Securities Industry Act 1983. The Sessions Court found the appellant guilty and sentenced him to one day's imprisonment and a fine of RM2.5 million in default 18 months' imprisonment. He had served the imprisonment sentence and paid the fine. Both the respondent and the appellant appealed against the decision of the Sessions Court. The respondent appealed against
I the sentence of one day imprisonment while the appellant appealed against his conviction and sentence. The appellant's appeal was struck out as he failed to attend court. On the date of the respondent's appeal, the appellant was absent. Taking into account the fact that the respondent had attempted

to locate the appellant but was unsuccessful, the High Court decided to proceed with the appeal and ordered enhancement of the sentence of one day imprisonment to 24 months' imprisonment. The appellant filed a notice of appeal against the decision of the High Court in enhancing the one-day imprisonment to 24 months' imprisonment. A preliminary objection was raised by the respondent that the appeal was incompetent on the ground that the instruction to appeal came from the appellant's daughter and not from the appellant himself. Hence, the respondent submitted that the counsel purportedly acting for the appellant had no *locus standi* to act in this appeal. The main issues that arose in this appeal were (i) whether the respondent's notice of appeal was served on the appellant; (ii) whether the High Court Judge had contravened s. 314(1) of the Criminal Procedure Code ('CPC') in enhancing the imprisonment sentence from one day imprisonment to 24 months in the absence of the appellant; and (iii) whether the order of the High Court was null, void and illegal and ought to be set aside.

Held (allowing appeal)
Per Hadhariah Syed Ismail JCA in delivering the judgment of the court:

(1) There is no law prohibiting a family member of the appellant from giving instruction to a solicitor to file an appeal in a situation where the appellant could not be located. The court's paramount consideration is to determine whether the sentence passed by the High Court is in accordance with the law and that no miscarriage of justice would be caused to the appellant if the appeal is heard on merits. Courts are not concerned with technicalities. Thus, the respondent's preliminary objection was rejected. (para 13)

(2) The words used in s. 314(1) of the CPC are clear and unambiguous in that the notice of appeal was to be served personally on the appellant. In the present case, the notice of appeal was not served personally on the appellant. Therefore, s. 314(1) had not been complied with. This was a case where both notice of appeal and notice of hearing were not served on the appellant. The High Court Judge ('HCJ') had erred in law and in fact when he held the notice of appeal had been served on the appellant on the basis that his previous solicitors had attended two case managements. Service of the notice on the appellant and attendance of his solicitors at the case management were two separate and distinct matters. The court could not assume notice was personally served on the appellant just because his solicitors attended case management. This was not how service was to be effected. The HCJ's decision that the notice of appeal had been served on the appellant was a wrong decision in law and fact. (paras 20 & 26)

(3) Even though the court could proceed with the appeal in the absence of the appellant under s. 314(2) of the CPC, s. 314(2) must be read together with s. 314(1) *ie,* the court is still subject to the limitation 'that the court shall not make any order in the matter of the appeal adverse to or to the

prejudice of the respondent.' Thus, the new sentence of 24 months' imprisonment was severe, adverse to and was prejudicial to the appellant. The sentence of 24 months imprisonment was a clear violation of s. 314(1) of the CPC. (paras 32 & 33)

(4) The courts have no authority to act in contravention of written law and where an order of such a court is made in breach of statute, it is made without jurisdiction and may, therefore, be declared void and set aside in proceedings brought for that purpose. The High Court's order in enhancing the sentence of imprisonment, from one day to 24 months, was therefore held to be null, void and illegal and ought to be set aside. To prevent injustice, this court exercised its inherent powers under r. 105 of the Rules of the Court of Appeal 1994. (paras 34 & 40)

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Ishak Hj Shaari v. PP [2006] 2 CLJ 325 CA ***(refd)***
Lau Keen Fai v. Lim Ban Kay & Anor [2012] 1 CLJ 569 FC ***(refd)***
PP v. Chan Quee Long [1993] 4 CLJ 262 HC ***(refd)***
PP v. Foo Kim Lai [2008] 9 CLJ 740 HC ***(refd)***
PP v. Goh Thor Kiah [1952] CLJU 85; [1952] 1 LNS 85 HC ***(refd)***

Legislation referred to:
Common Gaming Houses Act 1953, s. 4A(a)
Criminal Procedure Code, ss. 173A, 314(1), (2)
Penal Code, s. 354
Rules of the Court of Appeal 1994, rr. 73, 76, 105
Securities Industry Act 1983, ss. 122(1), 122B(a), (bb)

For the appellant - Sithambaram, Guok Ngek Seong, Lee Wen Rui; M/s Guok Partnership
For the respondent - Mohd Hafiz Mohd Yusoff, Aerie Rahman, Daniel Ariff & Eunice Ong; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Appeal No: WA-42H-10-09-2020 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] This is an appeal by Gan Boon Aun against the decision of the High Court dated 25 January 2022 wherein the High Court had allowed the respondent's appeal against the sentence meted out by the Sessions Court in the absence of the appellant and enhanced the sentence of one day imprisonment imposed by the Sessions Court against the appellant under s. 122B(a)(bb) read together with s. 122(1) of the Securities Industry Act

1983 to imprisonment of 24 months and affirmed the sentence of fine in the sum of RM2.5 million in default 18 months' imprisonment imposed by the Sessions Court against the appellant.

[2] This appeal raised one important issue, *ie*, whether the High Court's order dated 25 January 2022 is in contravention of the provisions of s. 314(1) of the Criminal Procedure Code and is therefore null, void and illegal and ought to be set aside *ex debito justitiae*.

Background Facts

[3] The appellant was charged with an offence of giving a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's "Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006", an offence under s. 122B(a)(bb) read together with s. 122(1) of the Securities Industry Act 1983.

[4] The trial commenced at the Sessions Court on 22 July 2010. At the end of the prosecution's case, the court held that the prosecution had established a *prima facie* case. The appellant was called upon to enter his defence. However, the defence's case did not proceed promptly as the appellant had filed several applications to challenge the constitutionality of some provisions in the Securities Industry Act 1983. These applications and the appeals arising there from took up almost seven years and were heard at all levels, from the Sessions Court to the Federal Court.

[5] The defence's case eventually commenced in July 2018. The appellant was the sole witness. On 27 August 2020, the Sessions Court found the appellant guilty and sentenced him to one day's imprisonment and a fine of RM2.5 million in default 18 months imprisonment. He had served the imprisonment sentence and paid the fine.

[6] Both the respondent and the appellant appealed against the decision of the Sessions Court. The respondent appealed against the sentence of one day imprisonment. The appellant appealed against his conviction and sentence.

[7] Both appeals were fixed to be heard together before High Court Judge, Zaini Mazlan J. The case managements for both appeals were fixed on 17 November 2020, 22 December 2020, 2 March 2021, 6 May 2021, 25 May 2021, 15 July 2021, 29 September 2021 and 13 October 2021. However, the appellant's counsel, Dato' Tan Hock Chuan from Messrs Tan Hock Chuan & Co discharged himself for both appeals during the case management on 2 March 2021 on the ground of lack of instructions from the appellant. The appellant did not attend any case management after that, even though the court had issued letters to him to inform him of the dates.

[8] The appellant's appeal was fixed for hearing on 13 October 2021. The respondent's appeal was fixed for case management on the same date. The appellant's appeal was struck out as he had failed to attend.

[9] The respondent's appeal was fixed for hearing on 18 October 2021. The appellant was still absent. A warrant of arrest was issued against him. The appeal was adjourned to 13 December 2021. As the police could not execute the arrest warrant on the appellant, the appeal was adjourned to 25 January 2022.

[10] On the date of the hearing of the respondent's appeal on 25 January 2022, the appellant or his counsel was not present. Learned Deputy Public Prosecutor (DPP) informed the learned High Court Judge that the warrant of arrest could not be executed. Taking into account the fact that the respondent had attempted to locate the appellant for the past one year, but was unsuccessful, the learned High Court Judge decided to proceed with the appeal and ordered enhancement of the sentence of one day imprisonment to 24 months imprisonment.

[11] On 7 February 2022, the appellant filed a notice of appeal against the decision of the High Court in enhancing the one-day imprisonment to 24 months' imprisonment.

Preliminary Objection

[12] On 6 January 2023, the respondent gave a notice of preliminary objection that the appeal is incompetent on the ground, that the instruction to appeal came from the appellant's daughter and not from the appellant himself. Hence, the respondent submits that the counsel purportedly acting for the appellant had no *locus standi* to act in this appeal.

[13] We reject the preliminary objection. In our view, there is no law prohibiting a family member of the appellant from giving instruction to a solicitor to file an appeal in a situation where the appellant could not be located. Our paramount consideration is to determine whether the sentence passed by the High Court is in accordance with the law and that no miscarriage of justice would be caused to the appellant if the appeal is heard on merits. We should not be concerned with technicalities.

Grounds Of Appeal

[14] In his memorandum of appeal, the appellant raised 13 grounds in support of his appeal. They are as follows:

(i) the learned High Court Judge erred in law and in fact when it held that the notice of appeal was 'properly served' on the appellant (where he was the respondent at the High Court).

(ii) the learned High Court Judge took into consideration irrelevant facts to conclude that the prosecution's notice of appeal had been purportedly served on the appellant.

(iii) the learned High Court Judge erred in law and/or in fact by taking judicial notice of the comprehensive news coverage of the case that the appellant had knowledge of the prosecution's notice of appeal and had been evasive.

(iv) the learned High Court Judge erred in fact when he made a finding that the appellant had 'deliberately evaded being notified of the court proceedings' and that he 'is a recalcitrant offender as he evaded service and went into hiding and now absconded' without any evidence and/or any affidavit affirmed by the investigating officers and filed by the prosecution to support the same.

(v) the learned High Court Judge erred in law and/or in fact when he held that the requirement of service of notice of appeal had been satisfied in accordance with the provision of s. 314 of the Criminal Procedure Code. Further, the learned High Court Judge failed to appreciate the totality of the facts and/or circumstances of the case as stated above, leading to erroneous judgment being given against the appellant.

(vi) the learned High Court Judge erred in law when he proceeded to hear the prosecution's appeal and subsequently enhanced the imprisonment sentence in the absence of the appellant.

(vii) the learned High Court Judge erred in law when he failed to take into consideration the relevant laws and/or authorities on s. 314 of the Criminal Procedure Code that an appeal cannot proceed in the absence of the appellant (who was the respondent at the High Court) and/or even if it can be proceeded, the High Court "shall not make any order in the matter of the appeal adverse to or to the prejudice" of the appellant.

(viii) the learned High Court Judge erred in law and/or in fact when he held that the appellant had chosen to waive his rights to be heard under the principle of *audi alteram partem*.

(ix) the learned High Court Judge erred in law when he failed to take into consideration that the intention behind s. 314 of the Criminal Procedure Code *ie*, the incongruity of sentencing a man without him having the opportunity to be heard is in plain violation of the fundamental principle of *audi alteram partem*.

(x) the learned High Court Judge erred in law when he held that he could proceed with the hearing of the prosecution's appeal in the absence of the appellant and to enhance the sentence against the appellant in his absence contrary to s. 314 of the Criminal Procedure Code.

(xi) the learned High Court Judge erred in law and in fact when he took into consideration irrelevant factors in enhancing the imprisonment sentence against the appellant from one day to 24 months including the previous proceedings prior to the trial at the Sessions Court.

(xii) the learned High Court Judge erred in law and in fact when he failed to take into consideration the date of the offence and the trend of sentencing in respect of the offence and/or similar offences at that material time.

(xiii) in view of the foregoing grounds of appeal, the learned High Court Judge erred in law and in fact when he proceeded to hear the prosecution's appeal in the absence of the appellant and enhanced the imprisonment sentence against the appellant from one day to 24 months. And the appellant, therefore, prays that this Honourable Court to exercise its supervisory powers and/or ancillary powers under r. 73 of the Rules of the Court of Appeal and/or other laws and/or inherent jurisdiction of this court to set aside the decision of the High Court enhancing the sentence of imprisonment against the appellant from one day to 24 months.

The Issues

[15] Despite there being 13 grounds of appeal, we propose to narrow them to the following three main issues:

(i) whether the respondent's notice of appeal was served on the appellant.

(ii) whether the learned High Court Judge had contravened s. 314(1) of the Criminal Procedure Code in enhancing the imprisonment sentence from one day imprisonment to 24 months in the absence of the appellant.

(iii) whether the order of the High Court dated 25 January 2022 is null, void and illegal and ought to be set aside.

Whether The Respondent's Notice Of Appeal Was Served On The Appellant

[16] The High Court proceeded to hear the respondent's appeal under s. 314 of the Criminal Procedure Code which reads as follows:

> **314. Non-appearance of respondent**
>
> (1) If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service through the Registrar.
>
> (2) If the service of the last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.

[17] Before us, learned Deputy Public Prosecutor (DPP) conceded that the respondent's notice of appeal was served upon the appellant's previous solicitors, Messrs Tan Hock Chuan & Co. The DPP submitted that service of the notice of appeal on the appellant's previous solicitors, Messrs Tan Hock Chuan & Co is a good service based on two grounds. First, s. 314(1) of the CPC does not require the notice of appeal to be personally served on the appellant. Second, the appearance of the appellant's previous solicitors at the case managements before the High Court would be sufficient to show that the notice of appeal was duly served upon the appellant.

[18] On the other hand, learned counsel for the appellant submitted that s. 314(1) of the CPC requires the notice of appeal to be served personally on the appellant (respondent at the High Court) and not on his solicitors. Counsel emphasised the words 'respondent', 'duly served upon him', 'shall issue requisite notice to him' used in s. 314(1). It was submitted that nowhere in s. 314(1) does it say or indicate that inference can be made that service of the notice to the respondent's solicitors is deemed as service on the respondent.

[19] In giving effect to the provisions of s. 314(1), we are guided by the decision of the Federal Court in the case of *Lau Keen Fai v. Lim Ban Kay & Anor* [2012] 1 CLJ 569, wherein the Federal Court held 'where the words are clear and unambiguous, a court should give effect to the plain words'.

[20] We, agree with the submission of counsel for the appellant that the words used in s. 314(1) are clear and unambiguous in that the notice of appeal is to be served personally on the appellant. In the present case, with the concession made by the DPP, we find the notice of appeal was not served personally on the appellant. Therefore, s. 314(1) has not been complied with. Hence, a service does not constitute proper service in accordance with law.

[21] In fact, the non-service of the notice on the appellant is supported by the court's notes of proceedings during case management on 15 July 2021 before the Deputy Registrar. On 15 July 2021, the DPP informed the Deputy Registrar:

> IO telah serah notis kepada Gan Boon Aun, Peguam Tan Hock Chuan telah tarik diri. IO telah buat cubaan serahan sebanyak 6 kali untuk 2 alamat. TPR masih ingin buat usaha lagi untuk buat serahan. TPR mohon kes disebut di hadapan Hakim untuk mohon waran tangkap.

[22] On 18 October 2021, on the date fixed for hearing of the appeal, the learned High Court Judge made the following notes:

> Case is fixed for the hearing of appeal. Appellant's counsel stated that they have not been able to effect service on the respondent and that the respondent has been evading service.

[23] We also took note of the affidavits of the investigating officer, one Jonathan Chin Ter Yang, affirmed on 11 October 2021, 20 October 2021, 9 December 2021 and 20 January 2022, where he detailed his attempts to serve notice of hearing instead of notice of appeal on the appellant at a few addresses. All these attempts were not successful.

[24] Based on the affidavit evidence of the investigating officer, it is clear to us that this is a case where both notice of appeal and notice of hearing were not served on the appellant.

[25] Despite the obvious, in the grounds of judgment, the learned High Court Judge held:

A

15. The respondent's counsel had attended the case management on 22 December 2020 and 2 March 2021 for this appeal and his appeal. It is apparent that the respondent had been served with the notice of appeal as his counsel had attended the case management on two occasions, although he had discharged himself on 2 March 2021. Therefore, I agree with the appellant's contention that the notice of appeal has been served on the respondent, satisfying the requirement under section 314 CPC. I also took note that the respondent had filed his notice of appeal a day after the prosecution had filed its notice of appeal, which could only mean that he was aware of the prosecution's appeal after being served with the notice of appeal.

B

C

...

18. In any event, I opine that section 314(2) CPC too had been fulfilled. I also took judicial notice that there was comprehensive news coverage of this case. It is more probable than not that the respondent had been evasive. Given the strenuous efforts by the appellant, I am satisfied that the service of the notice as required under section 314(2) CPC cannot be effected.

D

...

20. The respondent had deliberately evaded being notified of the court proceedings, considering the many efforts made to trace him. He is a recalcitrant offender as he had evaded service, went into hiding and now absconded. If tolerated, this would only bring disrepute to the court's proceedings. The respondent had chosen to waive his rights to be heard under the principle of *audi alteram partem*.

E

[26] With respect, we find the learned High Court Judge had erred in law and in fact when he held the notice of appeal had been served on the appellant on the basis that his previous solicitors had attended two case managements. In coming to that decision, the learned High Court Judge had misunderstood the express provisions of s. 314(1) of the CPC which requires notice of appeal to be served personally on the appellant. Service of the notice on the appellant and attendance of his solicitors at the case management are two separate and distinct matters. The court cannot assume notice was personally served on the appellant just because his solicitors attended case management. That is not how service is to be effected. The only way the learned High Court Judge can satisfy himself that the notice of appeal has been served on the appellant is there must be an affidavit of service affirmed by the investigating officer stating he had served the notice of appeal personally on the appellant. Anything short of this will not suffice. In this case, there is no such affidavit before the court. In addition, we also find the learned High Court Judge had taken into consideration irrelevant facts, *ie*, the appellant had waived his right to be heard which led to the wrong decision being made. For the aforesaid reasons, we find his decision that the notice of appeal had been served on the appellant is a wrong decision in law and fact.

F

G

H

I

Whether The Learned High Court Judge Had Contravened s. 314(1) Of The CPC In Enhancing The Sentence Of Imprisonment From One Day To 24 Months

[27] Apparently, at the High Court, learned counsel for the respondent referred to the learned High Court Judge the following three cases:

(i) *PP v. Goh Thor Kiah* [1952] CLJU 85; [1952] 1 LNS 85; [1952] 1 MLJ 91b;

(ii) *PP v. Chan Quee Long* [1993] 4 CLJ 262;

(iii) *PP v. Foo Kim Lai* [2008] 9 CLJ 740; [2009] 1 MLJ 211.

[28] In *PP v. Goh Thor Kiah*, the respondent was charged for possession of opium. He pleaded guilty and was discharged under s. 173A of the CPC. The prosecution appealed against inadequacy of sentence. No notice was served on the respondent. The DPP applied under s. 314(2) to proceed with the appeal in the absence of the respondent and suggested a more severe sentence should be passed. Taylor J had this to say:

> It is admitted that his construction is surprising in that it involves the proposition that a person who has been acquitted in one of the lower courts might have his acquittal reversed and a conviction substituted and sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alteram partem* and in my view is wholly opposed to all our principles of judicial procedure.

In *Goh Thor Kiah*'s case, the court did not proceed with the appeal, but adjourned it to another date.

[29] In *PP v. Chan Quee Long* [1993] 4 CLJ 262, the respondent was charged for an offence under s. 4A(a) of the Common Gaming Houses Act 1953. He pleaded guilty and was sentenced to one year imprisonment and fined RM5,000 in default 500 days' imprisonment. The respondent served his imprisonment sentence in full. The fine was not paid. The DPP appealed against inadequacy of sentence. The appeal was postponed six times as the notice of appeal could not be served on the respondent. The High Court proceeded to hear the appeal in the absence of the respondent and dismissed the appeal. Abdul Malik Ishak JC (as he then was) took into consideration the limitation that 'the court shall not make any order in the matter of the appeal adverse to or to the prejudice of the absent respondent'.

[30] A similar approach was adopted by Suraya Othman J (as she then was) in *PP v. Foo Kim Lai* [2008] 9 CLJ 740; [2009] 1 MLJ 211. The High Court proceeded to hear the appeal in the absence of the respondent and dismissed the appeal.

[31] However, the learned High Court Judge held the above three cases are not applicable because in those cases, notices of appeal were not served on the respondent, whereas, in the case before him, the judge opined notice of appeal was served on the appellant, which we have already ruled to be erroneous.

[32] It appears to us that the learned High Court Judge was under the impression that as long as notice of appeal was served on the appellant, even though the appellant was absent, the court can proceed and enhance the sentence. In our view, even though the court can proceed with the appeal in the absence of the appellant under s. 314(2) of the CPC, s. 314(2) must be read together with s. 314(1) *ie*, the court is still subject to the limitation 'that the court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent'. This has been the consistent approach of the courts in the three cases cited above. In all three cases, the court refused to disturb the sentence imposed by the lower court. Instead, the court either adjourned or dismissed the appeal.

[33] Had the learned High Court Judge followed the three cited cases, he would have had no option, but to dismiss the appeal. In this case, the learned High Court Judge did not dismiss the appeal. Instead, he enhanced the sentence. It goes without saying that the new sentence of 24 months' imprisonment is severe, adverse to and is prejudicial to the appellant. The sentence of 24 months' imprisonment is a clear violation of s. 314(1) of the CPC.

Whether The Order Of The High Court Dated 25 January 2022 In Enhancing The Sentence Is Null, Void, Illegal And Liable To Be Set Aside

[34] It is trite law that courts have no authority to act in contravention of written law and where an order of such a court is made in breach of statute, it is made without jurisdiction and may, therefore, be declared void and set aside in proceedings brought for that purpose; see *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

[35] Before us, learned counsel for the appellant moved this court to exercise its ancillary and inherent powers under the Rules of the Court of Appeal 1994 to set aside the order of the High Court and restore the sentence meted by the Sessions Court.

[36] Rule 76 of the Rules of the Court of Appeal 1994 provides:

> **76. Ancillary powers of the Court**
>
> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

[37] Rule 105 of the Rules of the Court of Appeal 1994 provides:

> **105. Inherent powers of the Court**
>
> For the avoidance of doubt, it is declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[38] In *Ishak Hj Shaari v. PP* [2006] 2 CLJ 325; [2006] 3 MLJ 405, the applicant was convicted by the Magistrates' Court for outraging the modesty of a 14-year-old school girl, an offence under s. 354 of the Penal Code. He was sentenced to four years' imprisonment and two strokes of rotan. The applicant appealed against his conviction and sentence to the High Court. The High Court dismissed his appeal on conviction. But, the High Court reduced the term of imprisonment from four years to two years and set aside the sentence of whipping. The applicant applied for leave to appeal to the Court of Appeal. The leave application was dismissed. However, the Court of Appeal opined that the High Court had erred in altering the sentence imposed by the Magistrate. The court found that the sentence imposed by the Magistrate was not manifestly excessive having regard to the public interest and should not be disturbed. As a result of the High Court's intervention, the court further found a manifest injustice had occurred.

[39] In *Ishak*'s case, the Court of Appeal applied r. 76 of the Rules of the Court of Appeal 1994 to set aside the sentence imposed by the High Court and restore the sentence meted out by the Magistrates' Court. With regard to r. 76, Gopal Sri Ram JCA said:

> Rule 76 is a beneficial piece of subsidiary law. It was aimed at doing justice. It is a sweeping provision. The Court of Appeal has the jurisdiction and powers conferred on it by the Federal Constitution and the Act. What r. 76 did was to reinforce the Court of Appeal's powers by sweeping into the armoury of powers the Court of Appeal already has, those powers not already mentioned in the Act. As it is a provision whose purpose is the achievement of justice, it must, in accordance with well settled guides to construction be interpreted liberally and not narrowly.

[40] Based on *Badiaddin*'s case, we held that the High Court's order dated 25 January 2022, enhancing the sentence of imprisonment from one day to 24 months to be null, void and illegal and ought to be set aside. To prevent injustice, we exercise our inherent powers under r. 105 of the Rules of the Court of Appeal 1994. We allow the appeal and set aside the sentence of 24 months imprisonment imposed by the High Court on 25 January 2022. We restore the sentence of one day imprisonment imposed by the Sessions Court.